Swan Property Sdn Bhd & Ors v Maybank Trustees Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(IM)(NCC)-24–01 OF 2019 AND W-02(IM)(NCC)-26–01 OF 2019

MOHAMAD ZABIDIN, AZIZAH NAWAWI AND HASHIM HAMZAH JJCA

19 DECEMBER 2022

Civil Procedure — Striking out — Writ and statement of claim — Renovation exercise carried out by management corporation — Proprietors failed to pay costs of renovation — Proprietors filed actions against management corporation in High Court — Management corporation filed actions against proprietors in Strata Management Tribunal ('SMT') for outstanding contributions under the Strata Management Act 2013 and the renovation charges for renovation exercise — High Court allowed management corporation's application to strike out proprietors' actions in High Court — Whether proprietors' claim against management corporation was frivolous, vexatious, or otherwise an abuse of the court's process due to s 106 of Strata Management Act 2013 — Rules of Court 2012 O 18 r 19(1)

Constitutional Law — Legislation — Constitutionality — Whether s 106 of Strata Management Act 2013 was unconstitutional since it excluded court's inherent jurisdiction to hear disputes between parties — Strata Management Act 2013 s 106

The Summit Subang USJ ('The Summit') was an integrated property development consisting of the office block, the hotel block, the retail podium, and the basement car park. The plaintiffs were among the many unit proprietors in the retail podium. The first defendant was the management corporation of The Summit whilst the second defendant was the trustee for the parcels owned by AmFIRST Real Estate Investment Trust, a real estate investment trust established in Malaysia in 2006. The dispute between the parties in the present case arose from a renovation exercise carried out at the retail podium whereby the plaintiffs as proprietors in the retail podium had failed to pay the renovation cost. The plaintiffs had brought an action against the defendants before the Shah Alam High Court ('Suit 82') whilst the defendants had filed actions before the Strata Management Tribunal ('the SMT') against the plaintiffs for outstanding contributions under the Strata Management Act 2013 ('Act 757') and the renovation charges for the renovation exercise. Subsequently, the first defendant via encl 10 and the second defendant via encl 15 had filed applications to strike out the plaintiffs'

writ and statement of claim. The learned High Court judge ('the HCJ') had allowed encl 10 and ordered, inter alia, that the plaintiffs' claim against the first defendant was stayed until disposal of the SMT proceedings against the plaintiffs. In respect of encl 15, the learned HCJ ordered a stay of the plaintiffs' proceeding against the second defendant in Suit 82 pending the determination of the first defendant's claim against the plaintiffs before the SMT. Aggrieved by the decision, the plaintiffs had filed the present appeals. Appeal 26 was the second plaintiff's appeal against the learned HCJ's decision in encl 10 whilst Appeal 24 was the second plaintiff's appeal against the learned HCJ's decision in encl 15. The main question for the court's determination was in relation to the plaintiffs' submission that s 106 of Act 757 was unconstitutional since it excluded the court's inherent jurisdiction to hear disputes between parties. With respect to Appeal 24, the plaintiffs submitted that since the second defendant could not be made a party to the tribunal proceedings, the dispute was best decided in court. The plaintiffs claimed that there was a lacuna under s 106 of Act 757. The plaintiffs relied on the case of *Bina Jati Sdn Bhd v Sum-Projects (Bros) Sdn Bhd* [2002] 2 MLJ 71 ('*Bina Jati*'s case') where the High Court had allowed the respondent's originating summons to seek a declaration that the subject matter in dispute was not arbitrable and that the arbitration proceedings be stayed.

Held, dismissing the appeals with costs of RM10,000 for each appeal subject to allocator:

(1) It was trite law that the court may exercise its power under any of the limbs under O 18 r 19(1) of the Rules of Court 2012 ('the ROC') only in plain and obvious cases, when it could be clearly seen that a claim or answer was on the face of it to be obviously unsustainable. In the present case, the court found that the learned HCJ had correctly identified that the pivotal issue to be determined was whether the plaintiffs' claim against the first defendant was frivolous, vexatious, or otherwise an abuse of the court's process due to s 106 of Act 757 (see paras 18 & 20).

(2) Section 106 of Act 757 merely excluded the court's jurisdiction if there was an earlier and pending claim filed within the SMT's jurisdiction with the same claim filed in court. If the earlier proceeding before the SMT was withdrawn, abandoned, or struck out, the court still had the jurisdiction to hear the claim. Likewise, if the claim before the court was withdrawn, abandoned, or struck out, the SMT still had the jurisdiction to hear the claim. Ultimately, it was either the court or the SMT that would hear the claim, but not both concurrently. Therefore, s 106 of Act 757 was not ultra vires to the Federal Constitution and did not in any way amounted to usurpation to ouster the court's judicial power (see paras 29, 33 & 35).

(3) On the merits of this appeal, the court agreed with the first defendant that the claim for the renovation charges, inter alia, fell under para 3 Part 1 of the Fourth Schedule of Act 757, namely, a claim for the recovery of charges and non-payment of the same could be declared as a debt. As such, Part 1 of the Fourth Schedule was engaged, and the claim for the renovation costs fell within the jurisdiction of the SMT. The court agreed with the findings of the learned HCJ that the same issue was raised in the first defendant's claim before the SMT and the plaintiffs' claim against the defendants in Suit 82 before the High Court. Since the first defendant's claim before the SMT was filed earlier than the filing of Suit 82, and the claim had not been withdrawn, abandoned, or struck out, the court agreed with the learned HCJ that s 106(1) of Act 757 applied to the facts in the present case (see paras 36–38).

(4) Section 106(1) of Act 757 made it clear that the issue in dispute shall not be the subject of proceedings between the same parties in any court unless the proceeding before the court was commenced before the claim was filed with the tribunal or the claim before the tribunal was withdrawn, abandoned, or struck out. In the circumstances of this case and in view of the SMT proceedings, the plaintiffs' claim against the first defendant was frivolous, vexatious and it was otherwise an abuse of the court's process. As such, this was an obviously unsustainable case which should be struck out under O 18 r 19(1) of the ROC (see para 39).

(5) In relation to Appeal 24, the court agreed with the learned HCJ's finding that *Bina Jati*'s case could be distinguished for the reasons submitted by the first defendant as followed: (a) *Bina Jati*'s case concerned arbitration agreement and was totally different from the present case. In this regard, Arbitration Act 2005 did not have s 106 of Act 757 equivalent which provided that a claim could not be the subject of the proceedings in court if there was already a similar claim pending in the SMT; and (b) *Bina Jati*'s case concerned a construction dispute with allegation of liability against contractors, architect and engineer and their respective liability was different and separate from each other. The court also agreed with the learned HCJ's finding in relation to the claim of conspiracy to injure that: (i) the main issue was whether the first defendant breached Act 757 — this issue involved an examination of the legality of the renovation exercise and impugned charges and was within the jurisdiction of the SMT and if there was no breach of Act 757 by the first defendant, there could never be a claim for conspiracy; and (ii) if the SMT found that the first defendant breached Act 757, then the plaintiffs may commence their claim against the second defendant for conspiracy (see paras 41–42).

[Bahasa Malaysia summary

Summit Subang USJ ('The Summit') ialah pembangunan hartanah bersepadu yang terdiri daripada blok pejabat, blok hotel, podium runcit dan tempat letak

kereta bawah tanah. Plaintif-plaintif adalah antara pemilik unit bagi podium runcit. Defendan pertama ialah perbadanan pengurusan The Summit manakala defendan kedua ialah pemegang amanah bagi petak yang dimiliki oleh AmFIRST Real Estate Investment Trust, sebuah amanah pelaburan hartanah yang ditubuhkan di Malaysia pada tahun 2006. Pertikaian antara pihak-pihak dalam kes ini timbul daripada satu operasi pengubahsuaian yang dijalankan di podium runcit di mana plaintif-plaintif sebagai pemilik di podium runcit telah gagal membayar kos pengubahsuaian. Plaintif-plaintif telah membawa tindakan terhadap defendan-defendan di hadapan Mahkamah Tinggi Shah Alam ('Guaman 82') manakala defendan-defendan telah memfailkan tindakan di hadapan Tribunal Pengurusan Strata ('TPS') terhadap plaintif-plaintif bagi caruman tertunggak di bawah Akta Pengurusan Strata 2013 ('Akta 757') dan bayaran pengubahsuaian untuk operasi pengubahsuaian tersebut. Selepas itu, defendan pertama melalui lampiran 10 dan defendan kedua melalui lampiran 15 telah memfailkan permohonan untuk membatalkan writ dan pernyataan tuntutan plaintif-plaintif. Hakim Mahkamah Tinggi yang bijaksana ('HMT') telah membenarkan lampiran 10 dan memerintahkan, antara lain, bahawa tuntutan plaintif-plaintif terhadap defendan pertama ditangguhkan sehingga pelupusan prosiding TPS terhadap plaintif-plaintif. Berkenaan dengan lampiran 15, HMT yang bijaksana memerintahkan penangguhan prosiding plaintif-plaintif terhadap defendan kedua dalam Guaman 82 sementara menunggu penentuan tuntutan defendan pertama terhadap plaintif-plaintif di hadapan TPS. Terkilan dengan keputusan tersebut, plaintif-plaintif telah memfailkan rayuan semasa. Rayuan 26 ialah rayuan plaintif kedua terhadap keputusan HMT yang bijaksana dalam lampiran 10 manakala Rayuan 24 ialah rayuan plaintif kedua terhadap keputusan HMT yang bijaksana dalam lampiran 15. Persoalan utama bagi penentuan mahkamah adalah berhubung dengan hujahan plaintif-plaintif iaitu s 106 Akta 757 adalah tidak berperlembagaan kerana ia mengecualikan bidang kuasa sedia ada mahkamah untuk mendengar pertikaian antara pihak. Berkenaan dengan Rayuan 24, plaintif-plaintif berhujah bahawa oleh kerana defendan kedua tidak boleh dijadikan pihak dalam prosiding tribunal, pertikaian tersebut sebaiknya diputuskan di mahkamah. Plaintif-plaintif mendakwa terdapat lakuna di bawah s 106 Akta 757. Plaintif-plaintif bergantung kepada kes *Bina Jati Sdn Bhd v Sum-Projects (Bros) Sdn Bhd* [2002] 2 MLJ 71 ('kes *Bina Jati*') di mana Mahkamah Tinggi telah membenarkan saman pemula responden untuk mendapatkan pengisytiharan bahawa perkara yang dipertikaikan tidak boleh ditimbang tara dan prosiding timbang tara tersebut ditangguhkan.

Diputuskan, menolak rayuan-rayuan dengan kos sebanyak RM10,000 bagi setiap rayuan tertakluk kepada alokator:

(1) Sudah menjadi undang-undang yang mantap bahawa mahkamah boleh menggunakan kuasanya di bawah mana-mana bahagian di bawah A 18

k 19(1) Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') hanya dalam kes-kes yang jelas dan nyata, apabila ia boleh dilihat dengan jelas bahawa tuntutan atau jawapan adalah jelas tidak mampan. Dalam kes ini, mahkamah mendapati bahawa HMT yang bijaksana telah mengenal pasti dengan betul bahawa isu penting yang perlu ditentukan ialah sama ada tuntutan plaintif-plaintif terhadap defendan pertama adalah remeh, menyusahkan, atau sebaliknya penyalahgunaan proses mahkamah disebabkan oleh s 106 Akta 757 (lihat perenggan 18 & 20).

(2) Seksyen 106 Akta 757 hanya mengecualikan bidang kuasa mahkamah jika terdapat tuntutan yang lebih awal dan belum selesai difailkan dalam bidang kuasa TPS dengan tuntutan yang sama difailkan di mahkamah. Jika prosiding terdahulu dihadapan TPS ditarik balik, ditinggalkan atau dibatalkan, mahkamah masih mempunyai bidang kuasa untuk mendengar tuntutan tersebut. Begitu juga, jika tuntutan di hadapan mahkamah ditarik balik, ditinggalkan, atau dibatalkan, TPS masih mempunyai bidang kuasa untuk mendengar tuntutan tersebut. Akhirnya, sama ada mahkamah atau TPS sahaja yang akan mendengar tuntutan tersebut, tetapi bukan kedua-duanya serentak. Oleh itu, s 106 Akta 757 tidak ultra vires Perlembagaan Persekutuan dan tidak sama sekali membawa kepada rampasan kuasa untuk mengenepikan kuasa kehakiman mahkamah (lihat perenggan 29, 33 & 35).

(3) Atas merit rayuan ini, mahkamah bersetuju dengan defendan pertama bahawa tuntutan bagi bayaran pengubahsuaian, antara lain, adalah di bawah perenggan 3 Bahagian 1 Jadual Keempat Akta 757, iaitu, tuntutan untuk mendapatkan semula bayaran dan kegagalan membayar bayaran tersebut boleh diisytiharkan sebagai hutang. Oleh itu, Bahagian 1 Jadual Keempat telah digunapakai, dan tuntutan untuk kos pengubahsuaian jatuh dalam bidang kuasa TPS. Mahkamah bersetuju dengan penemuan HMT yang bijaksana bahawa isu yang sama telah dibangkitkan dalam tuntutan defendan pertama di hadapan TPS dan tuntutan plaintif-plaintif terhadap defendan-defendan dalam Guaman 82 di hadapan Mahkamah Tinggi. Memandangkan tuntutan defendan pertama di hadapan TPS difailkan lebih awal daripada pemfailan Guaman 82, dan tuntutan tersebut tidak ditarik balik, ditinggalkan atau dibatalkan, mahkamah bersetuju dengan HMT yang bijaksana bahawa s 106(1) Akta 757 terpakai ke atas fakta dalam kes ini (lihat perenggan 36–38).

(4) Seksyen 106(1) Akta 757 menjelaskan bahawa isu yang dipertikaikan tidak boleh menjadi subjek prosiding antara pihak yang sama di mana-mana mahkamah melainkan prosiding di hadapan mahkamah dimulakan sebelum tuntutan difailkan dengan tribunal atau tuntutan di hadapan tribunal ditarik balik, ditinggalkan atau dibatalkan. Dalam keadaan kes ini dan mengambil kira prosiding TPS tersebut, tuntutan

plaintif-plaintif terhadap defendan pertama adalah remeh, menyusahkan dan sebaliknya ia merupakan penyalahgunaan proses mahkamah. Oleh yang demikian, ini adalah kes yang jelas tidak mampan yang harus dibatalkan di bawah A 18 k 19(1) KKM 2012 (lihat perenggan 39).

(5) Berhubung dengan Rayuan 24, mahkamah bersetuju dengan dapatan HMT yang bijaksana bahawa kes *Bina Jati* boleh dibezakan atas alasan-alasan yang dikemukakan oleh defendan pertama seperti berikut: (a) kes *Bina Jati* adalah berkenaan dengan perjanjian timbang tara dan berbeza sama sekali daripada kes semasa. Dalam hal ini, Akta Timbang Tara 2005 tidak mempunyai s 106 Akta 757 yang bersamaan yang memperuntukkan bahawa tuntutan tidak boleh menjadi subjek prosiding di mahkamah jika sudah ada tuntutan serupa yang belum selesai di TPS; dan (b) kes *Bina Jati* melibatkan pertikaian pembinaan dengan dakwaan liabiliti terhadap kontraktor, arkitek dan jurutera dan liabiliti masing-masing adalah berbeza dan berasingan antara satu sama lain. Mahkamah juga bersetuju dengan penemuan HMT yang bijaksana berhubung dakwaan konspirasi untuk mencederakan bahawa: (i) isu utama ialah sama ada defendan pertama melanggar Akta 757 — isu ini melibatkan pemeriksaan kesahihan pengubahsuaian dan bayaran yang disangkal dan ini berada dalam bidang kuasa TPS dan jika tiada pelanggaran Akta 757 oleh defendan pertama, tidak akan ada tuntutan konspirasi; dan (ii) jika TPS mendapati defendan pertama melanggar Akta 757, maka plaintif-plaintif boleh memulakan tuntutan mereka terhadap defendan kedua untuk konspirasi (lihat perenggan 41–42).]

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (refd)

Bina Jati Sdn Bhd v Sum-Projects (Bros) Sdn Bhd [2002] 2 MLJ 71, CA (refd)

Indah Desa Saujana Corp Sdn Bhd & Ors v James Foong Cheng Yuen, Judge, High Court Malaya & Anor [2008] 2 MLJ 11; [2008] 1 CLJ 651, CA (refd)

Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545, FC (refd)

JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners) [2019] 3 MLJ 561, FC (refd)

Outlet Rank (M) Sdn Bhd v Malayan Banking Berhad & Anor [2013] 1 LNS 554, HC (refd)

Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case [2017] 3 MLJ 561, FC (refd)

Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317, CA (folld)

Legislation referred to

Administration of the Religion of Islam (Perak) Enactment 2004
Central Bank of Malaysia Act 2009 s 57
Courts of Judicature Act 1964 ss 23, 24, 25, Schedule
Housing Development (Control and Licensing) Act 1966 s 16
Land Acquisition Act 1960 s 40D
Rules of Court 2012 O 18 r 19(1), (1)(a), (1)(b), (1)(d), O 53
Strata Management Act 2013 ss 105, 105(1), (3), 106, 106(1), 121, Fourth Schedule, Part 1, para 3
Strata Titles Act 1985

Appeal from: Civil Suit No WA-22NCC-82–02 of 2018 (High Court, Kuala Lumpur)

Yeoh Cho Kheong (with Elizabeth Lau Yen Jin) (Ranjit Singh & Yeoh) in Civil Appeal Nos W-02(IM)(NCC)-24–01 of 2019 and W-02(IM)(NCC)-26–01 of 2019 for the appellants.
Yap Yeow Han (with Saw Li Lian) (Rahmat Lim & Partners) in Civil Appeal No W-02(IM)(NCC)-24–01 of 2019 for the respondents.
Harpal Singh Grewal (with Harwinder Kaur, Nahvinah Selvaraj, Sarita Menon Mohan and Kausalya Ponnusamy) (AJ Ariffin Yeo & Harpal) in Civil Appeal No W-02(IM)(NCC)-26–01 of 2019 for the respondents.

Hashim Hamzah JCA:

INTRODUCTION

[1] For ease of reference, parties shall be referred to as they were before the High Court below.

[2] There were four appeals before us which arose from the same civil suit, Civil Suit No WA-22NCC-82–02 of 2018 ('Suit 82') We have delivered our decisions on all four appeals.

[3] This ground concerns only two of the four appeals, both of which were appealed by the second plaintiff. The two appeals are Civil Appeal No W-02(IM)(NCC)-24–01 of 2019 ('Appeal No 24') and Civil Appeal No W-02(IM)(NCC)-26–01 of 2019 ('Appeal No 26').

Salient Facts

[4] The Summit Subang USJ ('The Summit') is an integrated property development consisting of the office block, the hotel block, the retail podium, and the basement car park. The plaintiffs are among the many unit proprietors in the retail podium.

[5] The first defendant is the management corporation of The Summit, incorporated under the Strata Titles Act 1985 (Act 318). A

[6] The second defendant is the trustee for the parcels owned by AmFIRST Real Estate Investment Trust ('AMFIRST'), a real estate investment trust established in Malaysia in 2006. AMFIRST wholly owned the hotel block and the basement car park share units, almost wholly owned the office block share units, and almost 70% of the retail podium share units. B

[7] The dispute between the parties in the present case arose from a renovation exercise carried out at the retail podium. C

[8] The resolution to carry out the renovation exercise at the retail podium was passed during the management corporation's ('MC') first Annual General Meeting ('AGM'). The renovation was subsequently carried out and duly completed on 18 July 2016. D

[9] During the second AGM, a resolution was passed that:

(a) the tender price of the renovation exercise amounted to RM70,480,868; E

(b) the cost would be borne by the respective unit proprietors of the retail podium at the rate of RM178.16 per share unit; and

(c) 10%pa penalty for late payment.

F

[10] More than 90% of the proprietors have paid the renovation cost, except for the plaintiffs.

[11] On 13 December 2017, the plaintiffs instituted a civil suit against the first and second defendants before the Shah Alam High Court via Civil Suit No BA-22NCvC-718–12 of 2017 ('the Shah Alam Suit'). However, on 22 February 2018, the Shah Alam Suit was withdrawn by the plaintiffs with the liberty to file afresh. Six days later, on 28 February 2018, the plaintiffs filed Suit 82 before the Kuala Lumpur High Court. The contents, matters and issues pleaded in the plaintiffs' statement of claim in Suit 82 are substantially the same as those in the plaintiffs' statement of claim in the Shah Alam Suit. G H

[12] On 20 December 2017, the first defendant instituted claims before the Strata Management Tribunal ('SMT') against the plaintiffs (except for the fifth plaintiff, the first plaintiff in respect of Lot F1.43 and the second plaintiff in respect of Lot S2.73). The first defendant later instituted the claim against the second plaintiff on 22 February 2018. The first defendant claimed outstanding contributions under the Strata Management Act 2013 (Act 757) and the renovation charges for the renovation exercise. I

[13] On 10 April 2018, the first defendant filed an application in encl 10 to strike out the plaintiffs' writ and statement of claim (except for the fifth plaintiff). The first defendant's application was allowed by the learned High Court judge ('HCJ'). The learned HCJ ordered that:

(a) the first defendant's application in encl 10 against the plaintiffs (except the claim of the first plaintiff concerning Lot F1.43) was allowed with costs of RM4,000 subject to allocatur;

(b) the first plaintiffs claim in respect of Lot F1.43 against the first defendant was stayed until the disposal of the tribunal proceeding against the plaintiffs; and

(c) the plaintiffs are at liberty to refile their claim in the event the tribunal proceedings against the plaintiffs are withdrawn.

[14] On 17 April 2018, the second defendant filed an application in encl 15 to strike out the plaintiffs' writ and statement of claim. The learned HCJ ordered a stay of the plaintiffs' proceeding against the second defendant in Suit 82 pending the determination of the first defendant's claim against the plaintiffs before the SMT.

[15] We will deal with the two appeals separately throughout this judgment.

APPEAL NO 26

[16] Appeal No 26 is the second plaintiffs appeal against the decision of the learned HCJ in encl 10.

[17] The first defendant's application to strike out the plaintiffs' (except the fifth plaintiff) writ and statement of claim was filed under O 18 r 19(1)(a), (b) and (d) of the Rules of Court 2012 ('the ROC 2012'), which states:

> 19 Striking out pleadings and endorsements (O 18 r 19)
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> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that —
>
> (a) it discloses no reasonable cause of action or defence, as the case may be;
>
> (b) it is scandalous, frivolous or vexatious;
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> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of the process of the Court,
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
>
> (2) No evidence shall be admissible on an application under subparagraph (1)(a).

(3) This rule shall, as far as applicable, apply to an originating summons as if it were a pleading.

[18] It is trite law that the court may exercise its power under any of the limbs under O 18 r 19(1) of the ROC 2012 only in plain and obvious cases, when it can be clearly seen that a claim or answer is on the face of it to be obviously unsustainable. In *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7, the Supreme Court held:

> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the Rules of the High Court are well settled. *It is only in plain and obvious cases that recourse should be had to the summary process under this rule* (per Lindley MR in *Hubbuck v Wilkinson* [1899] 1 QB 86, p 91), *and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable'* (*Attorney-General of Duchy of Lancaster v L &NW Ry Co* [1892] 3 Ch 274 (CA)). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (*Wenlock v Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871 (CA)). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 (which is in para materia with our O 33 r 2 of the Rules of the High Court) (*Hubbuck v Wilkinson*). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable. (Emphasis added.)

[19] We find it helpful to refer to the case of *Indah Desa Saujana Corp Sdn Bhd & Ors v James Foong Cheng Yuen, Judge, High Court Malaya & Anor* [2008] 2 MLJ 11; [2008] 1 CLJ 651 where Low Hop Bing JCA (as he then was) in speaking for this court said:

> [39] *A reasonable cause of action means simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person:* per Diplock LJ in *Letang v Cooper* [1965] 1 QB 222 at 242. This definition was followed in *Lim Keen v Choo Koon* [1970] 1 MLJ 158; [1969] 1 LNS 94; *Nasri v Mesah* [1971] 1 MLJ 32; [1970] 1 LNS 85; *Saw Gaik Beow v Cheong Yew Weng & Ors* [1989] 1 LNS 75; *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474; [1991] 3 CLJ 2781; [1991] 1 CLJ Rep 321 *and Credit Corp (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409; [1991] 2 CLJ 871; [1991] 1 CLJ Rep 69.
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> [73] In the context of O 18 r 19(1)(b), *'scandalous' is taken to mean wholly unnecessary and irrelevant and not just unpleasant allegations*: see eg, *Boey Oi Leng v Trans Resources Corporation Sdn Bhd* [2001] MLJU 566; [2002] 1 CLJ 405 (HC).
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> [74] *'Frivolous' or 'vexatious' means that the pleadings are obviously unsustainable.*
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> [75] In considering this ground, affidavit and undisputed facts may be referred to.
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> ...
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> [81] *The court has an inherent jurisdiction to prevent an abuse of its process: Raja*

Zainal Abidin Raja Hj Tachik & Ors v British-American Life & General Insurance Bhd [1993] 3 MLJ 16; [1993] 3 CLJ 606 (SC).

[82] Illustrations of an abuse of the process of the court include:

(a) *An intention to embarass the defendants: Ansa Teknik (M) Sdn. Bhd v Cygal Sdn Bhd* [1989] 2 MLJ 423; [1989] 1 LNS 26; or

(b) Where the process of the court has not been used in a bona fide manner and has been abused: *Hadi Hassan v Suria Records Sdn Bhd & Ors* [2005] 3 MLJ 522; [2004] 8 CLJ 225.

[83] *The categories of abuse of process of the court are never closed* and will certainly proliferate pursuant to the myriad of circumstances available from the factual matrix found in each particular case.

[84] In *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin* [1988] 1 SLR 374 at p 384, the Singapore Court of Appeal explained the scope of 'an abuse of the process of the court' under O 18 r 19(1)(d) which is in pari materia with ours. The term has been given a wide interpretation by the courts and includes considerations of public policy and the interests of justice. It signifies that the process of the court must be used bona fide and properly and must not be abused. *On the facts before us, the defendants have established an abuse of the process of the court.* (Emphasis added.)

[20] In the present case, we found that the learned HCJ had correctly identified that the pivotal issue to be determined is whether the plaintiffs' claim against the first defendant was frivolous, vexatious, or otherwise an abuse of the court's process due to s 106 of Act 757.

[21] According to the learned counsel for the plaintiffs, s 106 of Act 757 is unconstitutional since it excludes the court's inherent jurisdiction to hear disputes between parties. Reference was made to the case of *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 (FC), *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 (FC), and *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners)* [2019] 3 MLJ 561 (FC).

[22] The learned counsel for the plaintiffs further submitted that the SMT is merely an inferior tribunal, and the High Court has overriding jurisdiction to try this case. Furthermore, the learned counsel for the plaintiffs claimed that the SMT has no jurisdiction to hear the plaintiffs' claim since the plaintiffs are suing both the first and second defendants and are claiming for declaratory and injunctive reliefs, which the SMT has no power to grant.

[23] In *Semenyih Jaya*, the constitutionality of s 40D of the Land Acquisition Act 1960 (Act 486) was raised before the Federal Court. Under s 40D of Act 486, the courts were obliged to adopt the opinion of the two assessors or elect

to concur with either of them if their decision differed from each other in respect of the amount of reasonable compensation arising out of the acquisition. The provision was found by the Federal Court to be unconstitutional, as it amounted to a usurpation of the judicial power of the courts. The relevant passage of the Federal Court's decision can be seen below:

> [49] By s 40D of the Act, 'the amount of compensation to be awarded shall be the amount decided upon by the two assessors'. It would appear that s 40D of the Act has broadened the ordinary role of assessors from advisors to fact finders and adjudicators.
>
> Section 40D of the Act reads:
>
> > (1) In a case before the Court as to the amount of compensation or as to the amount of any of its items the amount of compensation to be awarded shall be the amount decided upon by the two assessors.
> >
> > (2) Where the assessors have each arrived at a decision which differs from each other then the Judge, having regard to the opinion of each assessor, shall elect to concur with the decision of one of the assessors and the amount of compensation to be awarded shall be the amount decided upon by that assessor.
> >
> > (3) Any decision made under this section is final and there shall be not further appeal to a higher Court on the matter.
>
> [50] *Section 40D of the Act thus imposes on the judge a duty to adopt the opinion of the two assessors or elect to concur with the decision of either of them if their decision differ from each other in respect of the amount of reasonable compensation arising out of the acquisition. The legislative intent is clear and unambiguous.* As highlighted by the Court of Appeal in *Jitender Singh a/l Pagar Singh & Ors v Pentadbir Tanah Wilayah Persekutuan and another appeal* [2012] 1 MLJ 56; [2012] 2 CLJ 165 a *High Court judge cannot come to a valuation different from that of the assessors*, or if different, from either one of them.
>
> [51] Wherefore now stands the judge? *It would appear that he sits by the sideline and dutifully anoints the assessors' decision.*
>
> [52] Section 40D of the Act therefore *effectively usurps the power of the court in allowing persons other than the judge to decide on the reference before it.* This power to decide a matter which is brought before the court is known as judicial power and herein lies the rub. What is 'judicial power'? (Emphasis added.)

[24] In *Indira Gandhi*, the first constitutional issue raised before the Federal Court was whether the High Court has exclusive jurisdiction under ss 23–25 and the Schedule of the Courts of Judicature Act 1964 read together with O 53 of the Rules of Court 2012 and its inherent jurisdiction to review the actions of the Registrar of Muallafs or his delegate acting as public authorities in exercising statutory powers vested by the Administration of the Religion of Islam (Perak) Enactment 2004. The question was answered in the affirmative. Zainun Ali FCJ (as she then was), speaking for the Federal Court, held:

> [107] It is not disputed that the *Registrar of Muallafs was exercising a statutory*

A *function as a public authority* under the Perak Enactment in issuing the said certificates. As had been clearly manifested earlier, the jurisdiction to review the actions of public authorities, and *the interpretation of the relevant state or federal legislation as well as the Constitution, lie squarely within the jurisdiction of the civil courts.* This jurisdiction, which constitutes the judicial power essential in the basic
B structure of the Constitution, is not and cannot he excluded from the civil courts and conferred upon the Syariah Courts by virtue of art 121(1A). (Emphasis added.)

[25] In *JRI Resources*, the primary issue is whether s 57 of the Central Bank of Malaysia Act 2009 (Act 701) is unconstitutional since any ruling made by
C the Shariah Advisory Council ('SAC') pursuant to a reference made to it is binding on the courts. The majority judgment answered this issue in the negative. Mohd Zawawi Salleh FCJ (as he then was), in delivering the majority judgment of the Federal Court, held:

D [297] The second feature of judicial power as explained by Her Ladyship Zainun Ali FCJ is vested only in persons appointed to hold judicial office. Therefore, a non-judicial personage has no right to exercise judicial power. As observed by Lord Diplock in *Hinds v The Queen* [1977] AC 195:

> E What, however is implicit in the very structure of a Constitution on the Westminster model is that judicial power, however it be distributed from time to time between various courts, is to *continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the Chapter dealing with the judicature*, even though this is not expressly stated in the Constitution. (Emphasis added.)

F [298] We have no reservations in accepting the proposition of law expounded in the *Semenyih Jaya* case. In our considered opinion, the SAC does not have any characteristics of judicial power as laid down in the *Semenyih Jaya* case. *The ruling made by the SAC is solely confined to the Shariah issue. The presiding judge who made reference to the SAC will then exercise his judicial power and decide the case based on the evidence submitted before the court. Since there is no judicial power vested in the SAC,*
G *the SAC does not usurp the judicial power of the court.* (Emphasis added.)

[26] Therefore, it is incumbent in the present case to look into s 106 of Act 757 and to determine whether there is a usurpation of the court's judicial
H power.

[27] Section 106 of Act 757 reads:

> Section 106 Exclusion of jurisdiction of court —
>
> (1) *Where a claim is filed with the Tribunal and the claim is within the Tribunal's*
I *jurisdiction, the issues in dispute in that claim*, whether as shown in the initial claim or as emerging in the course of the hearing, *shall not be the subject of proceedings between the same parties in any court unless*:
>
> (a) the *proceedings before the court were commenced before the claim was filed with the Tribunal*; or

(b) *the claim before the Tribunal is withdrawn, abandoned or struck out.*

(2) Where paragraph (1)(a) applies, the issues in dispute in the claim to which those proceedings relate, whether as shown in the initial claim or emerging in the course of the hearing, shall not be the subject of proceedings between the same parties before the Tribunal unless the claim before the court is withdrawn, abandoned or struck out.

(3) For the purpose of this section, a claim shall be deemed to have been made with the Tribunal when section 108 has been complied with. (Emphasis added.)

[28] In the present case, guided by the principle of statutory interpretation and construction outlined by this court in *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317 (CA), the learned HCJ had looked into the relevant Hansard (dated 19 December 2012 by the then Minister of Housing and Local Government) to determine the legislative intent behind the incorporation of the said provision. The learned HCJ concluded, in which we agree, that:

[36] Turning to the Hansard of 19 December 2012, the Minister of Housing and Local Government at the material time stated that the intention of establishing the Strata Management Tribunal, is amongst others:

> Antara elemen penambahbaikan yang paling penting ada pewujudan tribunal pengurusan strata yang akan mewujudkan di bawah rang undang-undang ini. Dengan prinsip murah, mudah dan cepat, pewujudan tribunal akan membenarkan akses yang mesra pengguna kepada semua pihak yang tidak berpuas hati untuk menyalurkan tuntutan berkaitan penyelenggaraan dan pengurusan kepada tribunal tersebut.

Therefore in interpreting s 106 of the SMA, this court must do it in accordance with the intention of Legislature as clarified in the Hansard and not stifle the purpose for which the Strata Management Tribunal was established in the first place.

[37] Based on the wordings of s 106 and (2) of the SMA*, I agreed with the observations of D1 and D2 that:*

(a) *a claim cannot be the subject of the proceedings in the Strata Management Tribunal if there is already a similar claim pending in court* unless the claim in court has been withdrawn, abandoned or struck out;

(b) *likewise, a claim cannot be the subject of the proceedings in court if there is already a similar claim pending in Strata Management Tribunal* unless the claim in Strata Management Tribunal has been withdrawn, abandoned or struck out;

(c) both ss 106(1) and (2) SMA are *drafted in such manner as to avoid having two similar claims to be decided in two different forums* ie the court and the Strata Management Tribunal. This would result in duplicity of proceedings which would:

(i) *waste unnecessary costs* to resolve essentially similar dispute in two different forums; and

A (ii) may result in two different forums arriving at *inconsistent decision.*

(d) s 106 excludes the court's jurisdiction to adjudicate on common issues in dispute in the Tribunal Proceedings;

(e) *in the event any party is not satisfied with the award of the Strata Management*
B *Tribunal*, the said party *may file an application under* s 121 of the SMA *to the High Court to*, amongst others, *set aside the award of the said Tribunal*. (Emphasis added.)

C **[29]** In short, s 106 of Act 757 merely excludes the court's jurisdiction if there is an earlier and pending claim filed within the SMT's jurisdiction with the same claim filed in court. If the earlier proceeding before the SMT is withdrawn, abandoned, or struck out, the court still has the jurisdiction to hear the claim. Likewise, if the claim before the court is withdrawn, abandoned, or struck out, the SMT still has the jurisdiction to hear the claim. As correctly put
D by the learned HCJ, this is to avoid duplicity of proceedings and inconsistent decisions between the two forums.

E **[30]** In our view, s 105 of Act 757, which confers jurisdiction to the SMT to hear and determine any claims specified in Part 1 of the Fourth Schedule to Act 757, does not confer any exclusive jurisdiction to the SMT which would otherwise derogate or usurp the judicial power of the courts. It only provides an alternative avenue for the parties to bring their claims.

F **[31]** Section 105 of Act 757 reads:

Section 105 Jurisdiction of Tribunal

(1) The Tribunal shall have the jurisdiction to hear and determine any claims specified in Part 1 of the Fourth Schedule and where the *total amount in*
G *respect of which an award of the Tribunal is sought does not exceed two hundred and fifty thousand ringgit* or such other amount as may be prescribed to substitute the total amount.

(2) For the avoidance of doubt, the Limitation Act 1953 [Act 254] shall not apply to the proceedings of the Tribunal.

H (3) The *jurisdiction of the Tribunal shall not extend to any claim in which the title* to any land, or any estate or interest in land, or any franchise, *is in question.* (Emphasis added.)

I **[32]** Certain limitations to the jurisdiction of the SMT were even put in place (see ss 105(1), 105(3) and the Fourth Schedule of Act 757).

[33] Ultimately, it is either the court or the SMT that would hear the claim, but not both concurrently. The apparent advantage of pursuing a claim before

the SMT is that it is cheaper and faster. Be that as it may, any aggrieved party may still challenge the SMT's award on the ground of serious irregularity under s 121 of Act 757 or apply to review the decision of the SMT under O 53 of the ROC 2012, an order of certiorari to quash the SMT's findings.

[34] See *Outlet Rank (M) Sdn Bhd v Malayan Banking Berhad & Anor* [2013] 1 LNS 554 (HC) on a similar issue under s 16 of the Housing Development (Control and Licensing) Act 1966 (Act 118).

[35] In a nutshell, we are of the considered opinion that s 106 of Act 757 is not ultra vires to the Federal Constitution and does not in any way amount to a usurpation to ouster the court's judicial power.

[36] On the merits of this appeal, we agree with the learned counsel for the first defendant that the claim for the renovation charges, inter alia, falls under para 3, Part 1 of the Fourth Schedule of Act 757, namely, a claim for the recovery of charges and non-payment of the same can be declared as a debt. As such, we find that Part 1 of the Fourth Schedule is engaged, and the claim for the renovation costs falls within the jurisdiction of the SMT.

[37] We agree with the findings of the learned HCJ that the same issue was raised in the first defendant's claim before the SMT and the plaintiffs' claim against the defendants in Suit 82 before the High Court.

[38] Since the first defendant's claim before the SMT was filed earlier than the filing of Suit 82, and the claim has not been withdrawn, abandoned, or struck out, we share the same view with the learned HCJ that s 106(1) of Act 757 applies to the facts in the present case.

[39] Section 106(1) of Act 757 made it clear that the issue in dispute shall not be the subject of proceedings between the same parties in any court unless the proceeding before the court was commenced before the claim was filed with the Tribunal or the claim before the Tribunal is withdrawn, abandoned, or struck out. In the circumstances of this case and in view of the SMT proceedings, the plaintiffs' claim against the first defendant was frivolous, vexatious and it is otherwise an abuse of the court's process. As such, we find this is an obviously unsustainable case which should be struck out under O 18 r 19(1) of the ROC 2012.

[40] In a nutshell, we found no merits in the plaintiffs' appeal. Therefore, the plaintiffs' appeal in Appeal No 26 was dismissed with costs of RM10,000.

APPEAL NO 24

[41] Appeal No 24 is the second plaintiffs appeal against the decision of the learned HCJ in encl 15. On this issue, the learned HCJ found that:

> [39] The plaintiffs submitted that since D2 cannot be made a party to the Tribunal Proceedings, the dispute is best decided in court and the dispute cannot be divided so that part is dealt with by the Strata Management Tribunal and another part by the court. The plaintiffs claim there is a lacuna under s 106 of the SMA. The case of *Bina Jati Sdn Bhd v Sum-Projects (Bros) Sdn Bhd* [2002] 2 MLJ 71 was cited. In *Bina Jati* the High Court allowed the respondent (Sum-Project)'s originating summons to seek a declaration that the subject matter in dispute was not arbitrable and that the arbitration proceedings be stayed. The Court of Appeal on appeal, amongst others, held:
>
> > 45.2 Where some are parties and others are not parties to the arbitration, it is best that their disputes be dealt with by the court.
> >
> > 45.3 Disputes between parties cannot be divided so tha t part is dealt with by arbitration and another part in court. The allegations of fraud and collusion between the appellant, the engineer and the architect cannot be dealt with in any proceedings (including arbitration) unless both the engineer and the architect are parties to those proceedings (pp 81 and 83).
>
> [39.1] With respect, the plaintiffs' submission is in my view flawed. *Bina Jati*'s case can be distinguished for the reasons submitted by D1—
>
> > (a) *Bina Jati*'s case concerns arbitration agreement and is totally different from the present case. In this regard, Arbitration Act 2005 does not have section 106 SMA equivalent which provides that a claim cannot be the subject of the proceedings in Court if there is already a similar claim pending in the SMT [Strata Management Tribunal]; and
> >
> > (b) *Bina Jati*'s case concerns a construction dispute with allegation of liability against contractors, architect and engineer and their respective liability is different and separate from each other.
>
> [40] In so far as the claim of conspiracy to injure is concerned, I am in agreement with the submission of D1 and D2 that —
>
> > (a) the main issue is whether D21 breaches the SMA. This issue involves an examination of the legality of the Renovation Exercise and impugned Charges and is within the jurisdiction of the Strata Management Tribunal. If there is no breach of the SMA by D1, there can never be a claim for conspiracy; and
> >
> > (b) if the Strata Management Tribunal finds that D1 breaches the SMA, then the plaintiff may commence their claim against D2 for conspiracy.

[42] We agree with the learned HCJ and found no reason to disturb her findings above.

[43] In short, we found no merits in the plaintiffs' appeal. Therefore, the plaintiffs' appeal in Appeal No 24 was also dismissed with costs of RM10,000.

CONCLUSION

[44] In conclusion, we are of the considered view that there are no merits in Appeals No 24 and 26. Therefore, these appelte are dismissed with costs of RM10,000 for each appeal subject to allocator.

Appeals dismissed with costs of RM10,000 for each appeal subject to allocator.

Reported by Dzulqarnain Ab Fatar